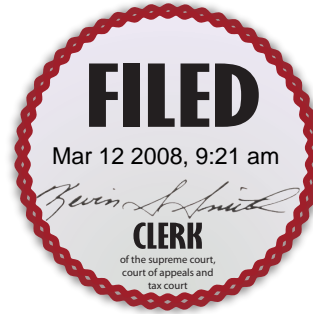


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JEFFREY D. STONEBRAKER
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JESSICA A. MEEK
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TROY LYNN CRAIG,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 10A01-0706-CR-253

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile Blau, Judge
Cause No. 10D02-0505-FD-348

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Troy Craig appeals his conviction for Class A misdemeanor operating a motor vehicle while intoxicated (“OWI”) and his status as a habitual substance offender.¹ We reverse his OWI conviction and accompanying habitual substance offender sentence enhancement. We remand for corrections to the sentence consistent with this opinion.

Issues

Craig raises three issues on appeal, but we find only two dispositive, which we restate as:

- I. whether conducting the trial on the OWI charge concurrent with the trial on the operating as an habitual traffic violator (“HTV”) charge was fundamental error; and
- II. whether the trial court erred in sentencing Craig.

Facts

On March 24, 2005, Officer Jerold Tenney attempted to stop Craig’s vehicle for an unsafe lane movement. Officer Tenney activated his lights and siren, but Craig did not stop his vehicle. Instead Craig drove away from the police cruiser, continuing to make unsafe lane movements, driving left of the center, and nearly striking another vehicle. Craig then drove through one parking lot, over a grass divider, and through another parking lot. He disregarded two stop signs and drove across a concrete highway

¹ Craig does not specifically argue on appeal that his Class D felony resisting arrest or Class D felony operating a vehicle after being adjudged a habitual traffic violator (“HTV”) convictions are problematic or should be reversed, but he requests in his conclusion that this court “reverse his convictions.” Appellant’s Br. p. 24. He does not present any cogent argument as to why these convictions should not stand and as such, we do not consider them on appeal. See Ind. Appellate Rule 46(A)(8).

divider. By this time, other officers arrived to assist Officer Tenney. Once Craig drove over stop sticks his tires began to deflate, and officers initiated a “rolling roadblock” maneuver. App. p. 19. Officers pulled Craig from the car and arrested him. They noted he was wearing a home detention ankle bracelet. Officers transported Craig to the jail where he failed three field sobriety tests. He refused a breath test. A search of the car revealed a case of beer with two open cans. Two officers on the scene also detected the smell of alcohol on Craig.

On May 31, 2005, the State charged Craig with Class D felony operating as an HTV, Class D felony OWI, Class A misdemeanor OWI, Class D felony resisting law enforcement, Class A misdemeanor criminal recklessness, Class D felony resisting law enforcement, Class A misdemeanor unlawful possession of a legend drug, Class D felony escape, and with being an habitual substance offender and an habitual offender. The State proceeded to trial on only three of the charges—Class A misdemeanor OWI, Class D felony resisting law enforcement, and Class D felony operating as an HTV.

Following a three-day jury trial, Craig was found guilty of all three charges. Craig entered a “blind plea” to being an habitual substance offender. Tr. p. 347. The trial court held a sentencing hearing on April 3, 2007. The trial court imposed an aggregate sentence of twelve years, with four suspended. In particular, the trial court sentenced Craig to three years suspended for the HTV conviction and one year suspended for the OWI conviction, to be served consecutively. It also sentenced him to three years suspended for the resisting conviction, to be served concurrently. The trial court

sentenced Craig to eight years for being adjudged an habitual substance offender and ordered that sentence consecutive to the HTV sentence. This appeal followed.

Analysis

I. Bifurcation

Craig contends that the trial court's failure to bifurcate the jury trial with respect to his OWI and HTV charges violated his due process rights. Craig acknowledges that he failed to request a bifurcated trial or object to the manner of the proceedings, and that his failure could be considered a waiver of the issue.

Craig contends, however, that the failure to bifurcate constitutes a fundamental error that overcomes the waiver and requires reversal. Fundamental error is a blatant violation of basic principles. Carden v. State, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007). The potential for harm must be substantial and deprive the defendant of fundamental due process. Id. "The error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Id.

The State contends that Craig cannot sit on his rights at trial and then succeed on a due process claim. The State relies on Nasser v. State, 727 N.E.2d 1105 (Ind. Ct. App. 2000), trans. denied, for the proposition that a defendant's failure to object or request bifurcation denies all merit to defendant's later contentions that he was entitled to a bifurcated procedure. That case is distinguishable, however, because the defendant in Nasser was facing trial for an enhancement of a traffic infraction for driving while suspended to a misdemeanor because of an identical prior infraction. Nasser, 727 N.E.2d at 1108. Craig faced a misdemeanor OWI charge and a felony HTV charge. The

evidence that came in to support the HTV charge did not consist merely of a prior traffic infraction, as it did in Nasser. Instead, Craig's driving record revealed a series of more serious convictions that were directly related to the current OWI charge.

The State admitted Craig's Indiana Bureau of Motor Vehicles driving record as Exhibit 1 during its case in chief.² The record was admitted in its entirety and without any redactions. It included several prior OWI convictions, as well as a litany of additional multiple references to driving license suspensions, driving with a suspended license, chemical test failures, failures to appear, and driving without insurance.³ Specifically, the record indicated two convictions for operating while intoxicated in 1994, one in 1998, and one in 2002. This extraneous information was not necessary to establish that Craig was an HTV and only served to highlight Craig's history of drunk driving.

Presenting evidence to the jury of Craig's former repeated drunk driving episodes while they considered the OWI charge was highly prejudicial. "[E]vidence of a prior conviction is as prejudicial as evidence can get, and requires a strong showing of probative value." Thompson v. State, 690 N.E.2d 224, 235 (Ind. 1997). Although the driving record was probative to the HTV charge, it was absolutely prejudicial to the consideration of the OWI charge. Therefore, the proceedings should have been

² Craig objected to this admission, but only on the grounds of improper authentication. The trial court overruled his objection.

³ The convictions listed on Craig's driving record include: 1) "no insurance—ticket," seven times; 2) "prior OWI within 5 years," twice; 3) "no insurance—accident," once; 4) "operating HTV/felony," once; 5) "drive while suspended," twice; 6) "operating while intoxicated," twice; 7) "disregard stop/yield sign"; and 8) "disregard traffic signal." Exhibit 1 pp. 3-4. Four attached "Notice of Suspension" forms indicated multiple suspensions for the prior OWIs. Id. at pp. 6-9.

bifurcated. We conclude that the failure to bifurcate reaches the level of fundamental error. See Ours v. State, 452 N.E.2d 1073, 1074 (Ind. Ct. App. 1983) (holding that it was fundamental error for the jury to hear evidence of defendant's prior OWI convictions for habitual status before it returned a verdict on the primary OWI charge).

The State contends that it is unlikely the admission of Craig's driving record influenced the fact finder regarding the OWI charge, given the other additional evidence presented to illustrate Craig's likely intoxication. The evidence of the three failed sobriety tests is challenged on appeal as inadmissible hearsay and we do not opine as to its admissibility here. Yet, we do not believe the additional evidence that Craig drove erratically while leading police on a chase, that he had beer in the car, or that two officers on the scene noticed the smell of alcohol conclusively establish that he was driving while intoxicated. Even though it pains us to reverse this conviction, we disagree with the State. Craig's lengthy and troubled history of driving while intoxicated was the first piece of evidence presented to the jury. It was prejudicial and denied him a fair trial. The jurors should have considered the current OWI charge without evidence of the prior incidents.

The failure to bifurcate these proceedings introduced the jurors to a host of prejudicial evidence against Craig on the OWI charge. We may speculate as to ways this evidence may have been less prejudicial or admitted in a redacted fashion, but that was not the case here—the evidence was admitted in its entirety for the jury to consider. We must reverse Craig's OWI conviction due to this fundamental error. Because the OWI conviction is reversed, Craig's habitual substance offender status and sentence

enhancement must also be set aside because it is based on that conviction. Our conclusion regarding the necessity of bifurcation, however, does not affect Craig's convictions for operating as an HTV and resisting law enforcement.

II. Sentence

Craig contends that several sentencing errors require us to remand for resentencing. Our reversal of the OWI conviction and the habitual substance offender enhancement eliminates that portion of the sentence and makes it unnecessary to address the alleged error there. We conclude, and the State concedes, that the trial court erred in assessing a \$500 drug fee. Although Craig was originally charged with a drug offense, Class D felony unlawful possession of a legend drug, that charge was dismissed prior to trial. We instruct the trial court on remand to remove this fee.

Finally, Craig contends the trial court failed to award him six months of credit time for earning his GED while incarcerated. After his convictions, but before he was sentenced, Craig obtained his GED. At the sentencing hearing when asked about potential credit time for the GED, the trial court correctly stated, "My understanding is that the Department of Corrections deals with all of that." Tr. p. 364. Indiana Code Section 35-50-6-3.3 authorizes the grant of credit time for educational achievement. An award of such educational credit time is left to the province of the Department of Correction. See Sander v. State, 816 N.E.2d 75, 78 (Ind. Ct. App. 2004) (holding that the application for educational time credit must be made by the jailing authority in cases where the education achievement was accomplished prior to sentencing). Craig's resolution, if any, regarding this credit time lies with the Department of Correction.

Conclusion

We conclude that the admission of Craig's driving record during the consideration of his OWI charge was highly prejudicial, and therefore, the failure to bifurcate amounted to fundamental error. We reverse the OWI conviction and Craig's status as an habitual substance offender. We remand for an adjustment to the sentence in accordance with this opinion.

Reversed and remanded.

NAJAM, J., and BAILEY, J., concur.